

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**A.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Detroit, MI, Employer**

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**Docket No. 14-614  
Issued: June 16, 2014**

*Appearances:*  
*Jennifer Howe*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On January 24, 2014 appellant, through her representative, filed a timely appeal from a September 24, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) and a November 22, 2013 nonmerit decision. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective September 24, 2013 on the grounds that she had no residuals of her accepted work injuries after that date; and (2) whether OWCP

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> Appellant submitted additional evidence after OWCP's November 22, 2013 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **FACTUAL HISTORY**

On October 18, 1978 appellant, then a 32-year-old clerk, filed a traumatic injury claim alleging that she sustained injury at work that day when the steel door of a mail container dropped down and struck the back of her head. OWCP accepted that she sustained a cerebral contusion and post-traumatic conversion disorder due to this work incident. Appellant stopped work on October 18, 1978 and received compensation on the periodic rolls for total disability.<sup>3</sup>

In an August 22, 2007 report, Dr. Mahmoud S. Mohamed, a Board-certified neurologist serving as an OWCP referral physician, determined that appellant no longer suffered from the cerebral contusion sustained on October 18, 1978. He stated that there was no evidence to suggest a neurological problem that was causing appellant's current symptoms. Dr. Mohamed noted that his clinical examination did not support appellant's current complaints as it was essentially normal. He stated that appellant had normal tone and bulk without spasticity, that visual and hearing testing was normal and that computerized axial tomography (CAT) scan testing of her head was normal.

OWCP further developed the medical evidence with respect to appellant's psychiatric condition and found a conflict in the medical opinion evidence regarding whether she continued to suffer from a conversion reaction. In a February 5, 2009 report, Dr. Patricia Martin, a Board-certified psychiatrist and neurologist serving as an impartial medical specialist, indicated that she agreed with Dr. Mohamed that appellant ceased to have a cerebral contusion. She stated that appellant continued to have a conversion disorder related to the October 18, 1978 injury. Appellant continued to receive compensation from OWCP after this evaluation.

The record contained no medical reports from attending physicians after Dr. Martin's evaluation. Therefore, in 2013, OWCP referred appellant to Dr. Erika V. Delong, a Board-certified psychiatrist and neurologist, for an examination and second opinion regarding whether she continued to have residuals of her October 18, 1978 injury.

In a June 19, 2013 report, Dr. Delong provided a discussion of appellant's factual and medical history, including the treatment of her conditions related to the October 18, 1978 injury. She discussed appellant's psychiatric treatment over the years and referenced Dr. Mohamed's August 22, 2007 report in which he indicated that CAT scan testing of appellant's head was normal and that there was no evidence that she continued to suffer from a work-related cerebral contusion. Dr. Delong discussed the findings of her interview and examination and indicated that when appellant completed an intake form in her office she was able to comfortably hold the pen, but had to move her right hand (*i.e.*, her writing hand) by pushing with her left hand. She stated that her secretary observed that, when appellant thought nobody was observing her, she filled out the remainder of the form with her right hand only, with no help or pushing from her

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<sup>3</sup> Appellant reported suffering right eye visual loss, right ear hearing loss and right-sided body numbness due to the October 18, 1978 work injury, but these conditions have not been accepted by OWCP. X-ray testing of appellant's skull taken shortly after her October 18, 1978 injury showed no fractures.

left hand. Dr. Delong stated that, when it was time for the interview, appellant appeared to have a hard time getting up and walked very slowly while dragging her right leg. After appellant left the office, Dr. Delong stood at the window and observed appellant walk swiftly to the parking lot with no dragging of her right leg and only the slightest of limps. She stated, "This appeared to be a completely different person than had been in my office only a few short minutes ago." Dr. Delong noted that the interview revealed that appellant's memory was intact for remote and recent events. She indicated that appellant's primary diagnosis was malingering.<sup>4</sup> Dr. Delong concluded that appellant did not have any residuals of the October 18, 1978 work injury, either with respect to the accepted cerebral contusion or the post-traumatic conversion reaction. She indicated that appellant was capable of returning to her regular, full-time work for the employing establishment from a psychiatric standpoint. Dr. Delong indicated that appellant might have to be retrained prior to a return to work due to her long absence from the work environment.

In an August 20, 2013 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits on the grounds that she ceased to have residuals of her accepted work injuries. It informed appellant that the proposed termination of her compensation was based on the opinion of Dr. Delong. OWCP provided appellant 30 days from the date of the letter to submit evidence and argument challenging the proposed termination action.

Appellant submitted an annotated copy of Dr. Delong's report in which she took issue with a number of the physician's statements. She asserted that a number of Dr. Delong's observations during her examination were untrue.

In a September 24, 2013 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective September 24, 2013. It found that she had no residuals of her accepted work injuries after that date as supported by the opinion of Dr. Delong.

On November 14, 2013 appellant filed a request for reconsideration of the termination of her compensation. She submitted a November 4, 2013 report of Evelyn Williams, an attending licensed practical nurse, and a November 5, 2013 report of Charlene Santee, an attending psychiatric mental health clinical nurse.

In a November 22, 2013 decision, OWCP denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the nurse reports submitted by appellant did not constitute probative medical evidence and were not relevant to the issue of the present case.

### **LEGAL PRECEDENT -- ISSUE 1**

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>5</sup> OWCP may not terminate compensation

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<sup>4</sup> Dr. Delong noted that appellant had a history of heart attack, hysterectomy, lumpectomy, gastric ulcer, fibromyalgia, arthritis, endometriosis and cerebral concussion.

<sup>5</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

without establishing that the disability ceased or that it was no longer related to the employment.<sup>6</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

Appellant alleged that she sustained injury at work on October 18, 1978 when the steel door of a mail container dropped down and hit her on the back of her head. OWCP accepted that she sustained a cerebral contusion and post-traumatic conversion disorder due to this work incident. Appellant stopped work on October 18, 1978 and received compensation on the periodic rolls for total disability. OWCP terminated her wage-loss compensation and medical benefits effective September 24, 2013 on the grounds that she had no residuals of her accepted work injuries after that date. It indicated that its termination action was justified by the opinion of Dr. Delong, a Board-certified psychiatrist and neurologist, who served as an OWCP medical adviser.

The Board finds that the weight of the medical opinion evidence is represented by the thorough, well-rationalized opinion of Dr. Delong, an OWCP referral physician. The June 19, 2013 report of Dr. Delong establishes that appellant had no residuals of her accepted work injuries after September 24, 2013.

In a June 19, 2013 report, Dr. Delong provided a discussion of appellant's factual and medical history and referenced an August 22, 2007 report in which Dr. Mohamed, a Board-certified neurologist serving as an OWCP referral physician, indicated that CAT scan testing of appellant's head was normal and that there was no evidence that she continued to suffer from a work-related cerebral contusion. Dr. Delong discussed the findings of her interview and examination and noted that appellant had a much greater ability to write and walk when she believed that she was not being observed. She noted that the interview revealed that appellant's memory was intact for remote and recent events. Dr. Delong determined that appellant's primary diagnosis was malingering. She concluded that appellant did not have any residuals of the October 18, 1978 work injury, either with respect to the accepted cerebral contusion or the post-traumatic conversion reaction, and that she was capable of returning to her regular, full-time work for the employing establishment.

The Board has carefully reviewed the opinion of Dr. Delong and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Delong provided a thorough factual and medical history and accurately summarized the relevant medical evidence.<sup>8</sup> She provided medical rationale for

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<sup>6</sup> *Id.*

<sup>7</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>8</sup> *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

her opinion by explaining that appellant did not exhibit any objective evidence of the accepted work conditions.<sup>9</sup>

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>10</sup> OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>11</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>12</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>13</sup> The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record<sup>14</sup> and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>15</sup> While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>16</sup>

The Board has held that the reports of nonphysicians under FECA, such as nurses, do not constitute probative medical evidence.<sup>17</sup>

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<sup>9</sup> Before OWCP and on appeal, appellant asserted that a number of Dr. Delong's observations during her examination were untrue, but, she failed to submit sufficient evidence to support these allegations.

<sup>10</sup> Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>11</sup> 20 C.F.R. § 10.606(b)(2).

<sup>12</sup> *Id.* at § 10.607(a).

<sup>13</sup> *Id.* at § 10.608(b).

<sup>14</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>15</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>16</sup> *John F. Critz*, 44 ECAB 788, 794 (1993).

<sup>17</sup> See *L.L.*, Docket No. 13-829 (issued August 20, 2013); *Bertha L. Arnold*, 38 ECAB 282, 285 (1986); 5 U.S.C. § 8101(2).

## **ANALYSIS -- ISSUE 2**

OWCP issued a decision on September 24, 2013. Appellant requested reconsideration of this decision on November 14, 2013. In her application for reconsideration, she did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant did not identify a specific point of law or show that it was erroneously applied or interpreted. She did not advance a new and relevant legal argument. Appellant submitted evidence which she felt showed that she continued to have residuals of her accepted work injuries. That is a medical issue which must be addressed by relevant medical evidence.<sup>18</sup> A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in this case. Appellant submitted November 4 and 5, 2013 reports of attending nurses, but such reports from nonphysicians would not constitute probative medical evidence and therefore would not be relevant to the main issue of the present case.<sup>19</sup>

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). She did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

## **CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective September 24, 2013 on the grounds that she had no residuals of her accepted work injuries after that date. The Board further finds that OWCP properly denied her request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>18</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>19</sup> See *id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 22 and September 24, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 16, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board